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No. (1) OFFICE OF THE CLERK

In the Supreme Court of the United States

CITY OF CINCINNATI,

Petitioner,

v.

CLEVELAND CONSTRUCTION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Ohio Court of Appeals, First Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a contractor bidding for a municipal construction contract on equal footing with other bidders can state a facial equal protection claim against the municipality's discretionary procurement system where contracts are awarded to the lowest and best bidder based on evaluating a non-exhaustive list of factors that may include the bidders' compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.

II. Whether strict or other heightened judicial scrutiny applies to a contractor's facial equal protection claim against a municipality's discretionary procurement system providing that all bidders compete *ex ante* on equal footing but allowing the municipality to consider, as part of a non-exhaustive list of factors, the bidders' compliance with equal opportunity and non-discrimination protections for minority-owned and women-owned subcontractors.

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Petitioner: City of Cincinnati

Respondent: Cleveland Construction, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, City of Cincinnati, Ohio, respectfully prays that a writ of certiorari be issued to review the final judgment of the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio.

OPINIONS BELOW

The Entry of the Court of Common Pleas, Hamilton County, Ohio, was filed July 13, 2005.[1] Asserting equal protection deficiencies, that Entry applied strict scrutiny and enjoined the City from prospectively considering bidding contractors' compliance with equal opportunity and non-discrimination requirements created to protect minority-owned and women-owned subcontractors.[2] On other issues, the trial court ruled, in part, in favor of Cleveland Construction, Inc. ("Cleveland Construction") and, in part, in favor of the City of Cincinnati ("City").

By Opinion dated December 8, 2006, the Court of Appeals, First Appellate District of Ohio, Hamilton County, Ohio ("First District Court of Appeals"), applied strict scrutiny and affirmed the Entry of the Court of Common Pleas enjoining the City's Small Business Enterprise subcontracting outreach

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[1] App. 69, *et seq.*

[2] App. 92-93.

requirements.[3] In an opinion filed May 2, 2007, the Supreme Court of Ohio accepted the City's appeal for review on due process and damages issues. The Supreme Court of Ohio did not accept the City's appeal challenging the lower courts' equal protection rulings enjoining the City's "lowest and best bid" subcontracting outreach requirements.[4]

On July 26, 2007, the City filed a petition for writ of certiorari with this Court[5] seeking review of the First District Court of Appeals' equal protection decision applying strict scrutiny and enjoining the City's prospective consideration of bidders' compliance with the equal opportunity and non-discrimination provisions of the City's procurement system. Cleveland Construction opposed that petition for writ of certiorari primarily on the ground that this Court lacked jurisdiction under 28 U.S.C. §1257 because there had not yet been a final appealable judgment. Cleveland Construction argued at that time in its Brief in Opposition:

> Thus, while the Supreme Court of Ohio denied discretionary review of the equal protection issue now presented to this Court, there are still ongoing proceedings in the Supreme Court of Ohio involving significant federal constitutional

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[3] App. 23, *et seq.* 169 Ohio App.3d 627, 864 N.E.2d 116. The First District Court of Appeals also ruled in favor of Cleveland Construction on due process and damages issues.

[4] App. 13-18.

[5] Case No. 07-113.

questions that are likely to be appealed to this Court at a later date. Therefore, there has not been a "final judgment" within the meaning of 28 U.S.C. §1257.

On October 9, 2007, this Court denied the City's petition for writ of certiorari.

Subsequently, on May 21, 2008, the Supreme Court of Ohio ruled in favor of the City on the alleged deprivation of due process issue, concluded that the City had broad discretion in applying its procurement program, and reversed the lower courts' conclusion that Cleveland Construction had a constitutionally-protected property interest in its bid for the City construction contract.[6] Cleveland Construction filed a motion for clarification or, in the alternative, for reconsideration with the Supreme Court of Ohio on May 29, 2008. That motion was denied on August 6, 2008.

This petition follows.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S.C. §1257(a).

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[6] 118 Ohio St.3d 283, 888 N.E.2d 1068 (2008).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional, statutory, and regulatory provisions involved in this appeal are in Appendix S. These provisions establish that bidding contractors for City construction contracts are placed on equal footing *ex ante*, and the City's procurement system authorizes the purchasing agent to award a contract to the contractor with the "lowest and best bid." Moreover, the purchasing agent may consider, as part of a non-exhaustive set of factors, a bidder's compliance with equal opportunity and non-discrimination requirements protecting minority-owned and women-owned subcontractors.

Appendix W contains the equal opportunity and non-discrimination rules and guidelines that are the focus of Cleveland Construction's facial claim that the City's procurement system may deprive it in the future of an alleged right to equal protection by requiring it to compete on unequal footing. In fact, all bidding contractors are placed on equal footing *ex ante*. The rules provide, for instance, that all bidders are required to 1) use good faith efforts to promote equal opportunities for minority-owned and women-owned subcontractors, 2) provide a description of their efforts, and 3) explain (if relevant) why minority-owned or women-owned subcontractors were underutilized in a bid.

STATEMENT OF THE CASE

The Cincinnati Municipal Code provides for "lowest and best bid" determinations for municipal

construction contracts. The City purchasing agent has the discretion to reject any and all bids and the authority to cancel an award at any time before execution of the contract. The Cincinnati Municipal Code authorizes the purchasing agent to permissively consider a non-exhaustive list of factors in determining the lowest and best bid for a contract. Barriers to participating in public contracts still exist in the City, significantly limiting opportunities for minority-owned and female-owned firms. To address this concern, the Cincinnati Municipal Code provides that one of the factors that the purchasing agent may consider is a bidder's compliance with the subcontracting outreach program that provides equal opportunity and non-discrimination protection for minority-owned and women-owned subcontractors.

The City began planning for the expansion of its Convention Center in the early 1990s. The City reserved both an overall project-specific percentage of the Convention Center work for small businesses and another drywall contract-specific percentage for small businesses. It is uncontroverted that the City's reservation of a specified percentage of subcontracting work for small businesses was race and gender neutral. These small business subcontracting provisions were not enjoined by the lower courts and are not the subject of this petition.

In early 2004, Cleveland Construction (a non-minority contractor) submitted a bid to the City for the Convention Center drywall contract work. However, Cleveland Construction did not include the specified percentage of small businesses in its bid and the bid was deemed nonresponsive for that reason. The

contract was thereafter awarded to Valley Interior Systems, Inc. (also a non-minority contractor), which had met the specific percentage for small businesses. It is uncontroverted that the subcontracting outreach program tracking the use of minority-owned and women-owned subcontractors in bids was not a factor in evaluating the Convention Center drywall contract bids.

On March 30, 2004, Cleveland Construction filed suit for injunctive relief and damages, claiming that the City violated its rights under the Cincinnati Municipal Code as well as its rights to procedural due process and equal protection under the Constitution. During the proceedings below, the City conceded that its disparity study did not justify remedial race-based or gender-based quotas for the hiring of construction subcontractors to rectify the effects of past discrimination.[7] The lower courts concluded that there was no evidence that the City's subcontracting outreach program caused Cleveland Construction to be an unsuccessful bidder for the Convention Center drywall work and did not grant Cleveland Construction's equal protection claim for damages. However, the lower courts did enjoin the City from *prospectively* applying its subcontracting outreach program as part of the list of non-exhaustive permissive factors for determining "lowest and best" bids.

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[7] The City stipulated in the trial court that the part of the subcontracting outreach program tracking minority-owned and women-owned subcontractors included in bids did not satisfy strict judicial scrutiny.

The trial court ruled that, as a matter of law, the City's subcontracting outreach program "indisputably pressures" contractors to recruit and use minority-owned and women-owned subcontractors.[8] The trial court concluded that the subcontracting outreach program did not satisfy strict judicial scrutiny and that Cleveland Construction prevailed on its facial equal protection challenge to the program.[9] The trial court enjoined the City's efforts to promote equal opportunity and non-discrimination in public contracting. Citing decisions from the Ninth, Sixth, and D.C. Circuits, the First District Court of Appeals affirmed.[10] The First District Court of Appeals held: "Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny."[11]

The First District Court of Appeals described its rationale: "Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences."[12] The First District Court of Appeals also ruled that "[t]o the extent that

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[8] App. 87.

[9] App. 92-93.

[10] App. 35-39.

[11] App. 37.

[12] App. 38.

the rules pressured bidders to hire women-owned subcontractors, the city was required to demonstrate an 'exceedingly persuasive' justification for the differential treatment."[13] The First District Court of Appeals ruled that the City's equal opportunity and non-discrimination program failed to meet strict or other heightened scrutiny and enjoined its operation.[14]

REASONS FOR GRANTING THE WRIT

I. An Unsuccessful Bidder For A Municipal Contract Cannot State A Cognizable Facial Equal Protection Claim Where There Are Possible Lawful Applications Of The Municipality's Discretionary Procurement System.

As an initial matter, given the discretionary nature of the City's procurement system, neither Cleveland Construction nor any other disappointed bidder can sustain a facial equal protection injury, because the awarding of contracts under this system is not predictive. As this Court recognized in *United States v. Salerno*, "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[15]

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[13] App. 38-39.

[14] App. 38-39.

[15] 481 U.S. 739, 745 (1987).

At issue in the *Salerno* case was a facial challenge to the constitutionality of the Bail Reform Act. Citing precedent, this Court noted, "The fact that the Bail Reform Act *might* operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."[16] Like the *Salerno* plaintiffs, Cleveland Construction here has failed to prove that there is no set of circumstances under which Cincinnati Municipal Code Section 321-37(c) could be constitutionally applied.[17]

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[16] *Id.* (citing *Schall v. Martin*, 467 U.S. 253, 269 (1984)) (emphasis added).

[17] It is worth questioning whether Cleveland Construction even has standing to assert a facial equal protection challenge to Cincinnati Municipal Code Section 321-37(c). As this Court held in *Northeastern Florida Chapter of the Associated General Contractors of America v. Jacksonville*, "The 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit .... To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." 508 U.S. 656, 657 (1993).

The very nature of the City's procurement program necessarily means that neither Cleveland Construction nor any other contractor can meet this threshold test. The City's procurement program affords the City purchasing agent with broad discretion to consider a non-exhaustive list of factors when awarding a contract. The system does not automatically exclude *anyone* from competing for a City contract. All prospective contractors have the same opportunity to be awarded the contract,

Cincinnati Municipal Code Section 321-37 provides in relevant part:

> (a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the *lowest and best* bidder.
>
> * * * * * * *
>
> (c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, *but are not limited to*:
> (1) Information concerning the bidder's performance on prior and current contracts with the city; or
> (2) Information concerning the bidder's current, past and proposed payment of prevailing wages; or
> (3) *Information concerning compliance with the "Non-Discrimination in Purchasing and Contracting" rules and regulations issued by the city manager pursuant to CMC Section 321-159*; or
> (4) *Information concerning compliance with the "SBE Subcontracting Outreach Program" rules*

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and thus, the program on its face does not prevent any contractor from bidding on an equal basis with all other contractors.

and regulations issued by the city manager pursuant to CMC Section 323-31.[18]

The City purchasing agent is not *required* to consider a bidder's compliance with the subcontracting outreach program when awarding a contract. By the same token, the bidders themselves come into the bidding process on equal footing—they are each given the same opportunity to meet the factors contained in the non-exhaustive list that the purchasing agent utilizes to determine who is the "lowest and best" bidder. A bidder's failure to meet one of the factors is not necessarily outcome-determinative.

A comparison of the City's procurement system, with its reliance on a non-exhaustive list of factors in determining lowest and best bidders for a contract, to the race-based initiative examined by this Court in *Grutter v. Bollinger*[19] further illustrates this distinction. The plaintiff in *Grutter*, a state resident denied admission to the University of Michigan Law School, challenged the admission policy on the basis of racial discrimination. The policy in question was designed to "achieve. . . diversity."[20] Specifically, the policy focused on achieving racial and ethnic diversity through "'the inclusion of students from groups that were historically discriminated against.'"[21] In the trial

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[18] App. 137-38 (emphasis added).

[19] 539 U.S. 306 (2003).

[20] *Id.* at 315.

[21] *Id.* at 316.

court, the law school's former admissions director testified that his staff was directed "to consider an applicant's race along with all other factors."[22] The current dean of the law school testified that with respect to the consideration of race as a factor in admissions, in some cases "it may be a "'determinative'" factor."[23] While the law school did not implement a percentage or quota system, it did seek to enroll "a critical mass of underrepresented minority students."[24]

This Court applied the strict scrutiny test to the admissions policy at issue in *Grutter*, reasoning that "[w]e apply strict scrutiny to all racial classifications to "'smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'"[25] In identifying the compelling interest supporting the use of the policy in *Grutter*, this Court focused on the "overriding importance of preparing students for work and citizenship"[26] and the paramount "importance of . . . openness [to all races and ethnicities] . . . in the

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[22] *Id.* at 318.

[23] *Id.* at 319.

[24] *Id.* at 335.

[25] *Id.* at 326 (quoting *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion)).

[26] *Id.* at 331.

context of higher education."[27] This Court observed that "the race-conscious admissions program adequately *ensures* that *all factors* that may contribute to student body diversity are meaningfully considered alongside race in admissions decisions."[28]

The City's goal with respect to its subcontracting outreach program was a benevolent one: "to afford its citizens [including businesses owned by minorities and women] equal opportunities to do business on City contracts."[29] This benevolent goal, however, is not a determinative factor in whether a contractor is awarded a City contract. Unlike *Grutter*, in which the law school admissions policy was subject to strict scrutiny because the policy *required* consideration of race, *required* an outcome achieving a "critical mass"[30] of underrepresented minority students, and *required* the policy be applied in a manner that race was sometimes the "determinative" factor, the City procurement system is discretionary in nature, such that there is no predictive measure that the same outcome will result in the awarding of each construction contract. While the purchasing agent *may* consider a bidder's compliance with the City's subcontracting outreach program, the purchasing agent is by no means *required* to select a certain bidder based on that factor.

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[27] *Id.* at 332.

[28] *Id.* at 337 (emphasis added).

[29] App. 147.

[30] *Grutter*, 539 U.S. at 318.

The City's program does not *ensure* consideration of race or gender as a factor in awarding a contract, nor does it *ensure* a particular result. Thus, there is no way for Cleveland Construction or any other prospective plaintiff to prevail on a facial equal protection challenge to the program.

II. This Court's Racial Classification Equal Protection Decision In *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007), Means That The Lower State Courts Overbroadly Construed Relevant Principles, Erroneously Applied Strict Judicial Scrutiny, And Unjustifiably Facially Enjoined The City's "Lowest And Best Bid" Procurement System.

A plurality of this Court stated in 2007 that "racial classifications" *mandating* government decisions based solely on race were subject to strict judicial scrutiny.[31] The plurality further stated: "It is well established that when the government distributes burdens or benefits *on the basis of individual racial classifications*, that action is reviewed under strict scrutiny."[32] In that case, students were categorically and oversimplistically classified by race, and school placement decisions were made based *solely* on a student's race. The plurality reiterated that "'the

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[31] *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (June 28, 2007).

[32] *Id.* at 2751 (emphasis added) (citing *Johnson v. California*, 543 U.S. 499, 505-06 (2005), *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003), *Adarand Constructors v. Pena*, 515 U.S. 200, 224 (1995)).

Government must treat citizens as individuals, not as simple components of a racial, religious, sexual or national class.'"[33]

In its opinion concluding that the City's procurement system did not create a constitutionally-protected property interest for Cleveland Construction, the Supreme Court of Ohio held that the City had broad discretion whether to grant or deny contracts. The Supreme Court of Ohio emphasized:

> *Given the extensive discretion of the city in considering bids*, Cleveland Construction had no property right in the drywall contract at issue in this case. No property interest is created when a city properly exercises its discretion and does not award a contract to a party deemed not to have complied with the requirements of the invitation to bid.[34]

Similarly, bidders' compliance with the City's subcontracting outreach program is part of a non-exhaustive list of factors subject to discretionary consideration by the City's purchasing agent, and the City's "lowest and best bid" procurement decisions are not mandated based solely on compliance with the subcontracting outreach program. The plurality acknowledged in *Parents Involved in Community*

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[33] *Id.* at 2757-58 (citing *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O'Connor, J., dissenting))).

[34] App. 9 (emphasis added).

Schools that setting measurable objectives to track the achievement of students from major racial and ethnic groups was very different than the invalidated racial classification in the case and had "nothing to do with the pertinent issues. . . ."[35]

Justice Kennedy's controlling concurring opinion in *Parents Involved in Community Schools* agreed with the plurality that the government must act "without treating each student in a different fashion solely on the basis of a systematic, individual typing by race."[36] Justice Kennedy condoned the use of race as one admission factor among others and held that school districts "are free to devise race-conscious measures to address the problem in a general way . . . ."[37]

Parents Involved in Community Schools must be read in light of the principle set forth in *Marks v. United States*[38] that the holding of the Court should be viewed as that position taken by the members who concurred in the judgment on the narrowest grounds. Thus, Justice Kennedy's concurring opinion in effect became the Court's ruling in *Parents Involved in Community Schools*. His opinion acknowledged the need in some instances to take race into account and identified some acceptable general ways that might

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[35] *Parents Involved in Community Schools*, 127 S. Ct. at 2766.

[36] *Id.* at 2792.

[37] *Id.*

[38] 430 U.S. 188, 193 (1977), reaffirmed in *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

happen: "strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race."[39] Justice Kennedy held: "These mechanisms are *race conscious* but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand *strict scrutiny* to be found permissible."[40]

Justice Kennedy emphasized: "Executive and legislative branches . . . should be permitted to employ [certain race conscious policies and procedures] ... with candor and with confidence that a constitutional violation does not occur whenever a decisionmaker considers the impact a given approach might have on students of different races."[41]

It is the view of Justice Kennedy—and the controlling rationale of *Parents Involved in Community Schools*—that race may be considered as one factor among others. Therefore, either because the City's procurement system does not *mandate* decisions based solely on race or gender, or because the procurement system in some instances may consider the bidders' equal opportunity and non-discrimination efforts as

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[39] *Parents Involved in Community Schools*, 127 S. Ct. at 2792.

[40] *Id.* at 2792 (emphasis added).

[41] *Id.*

one factor among others, strict or other heightened scrutiny should not be applied to the City's procurement system.

By contrast, the lower courts in the case at bar erroneously treated the City's discretionary "lowest and best bid" equal opportunity and non-discrimination procurement criteria the same as a mandatory individual "racial classification" and erroneously subjected the "lowest and best bid" procurement criteria to strict scrutiny. Unlike the school districts' categorical and oversimplistic mandatory racial classifications in *Parents Involved in Community Schools*, the City's non-exhaustive discretionary criteria do not mandate a procurement decision based solely on race. Rather, bidding contractors all stand on equal footing *ex ante* and the City's purchasing agent *may* consider, as one non-exhaustive factor, a bidder's compliance with the City's equal opportunity and non-discrimination requirements.

The City's procurement program strikes a legal balance between the ability to monitor the participation of minority-owned and women-owned businesses in City contracts and the imposition of individual race and gender-based mandates. The City's program does not create quotas or set-asides. It does not mandate that the City's purchasing agent select a bidder for a government contract based upon compliance with the program. The lower courts erred by applying strict or other heightened scrutiny to the City's subcontracting outreach program.

III. There Is A Split Of Federal Authorities On The Question Whether Strict Judicial Scrutiny Applies To A Discretionary "Lowest And Best Bid" Procurement System That Places Bidding Contractors On Equal Footing *Ex Ante* And Permits Consideration Of The Bidders' Compliance With Its Equal Opportunity And Non-Ddiscrimination Protections For Minority-Owned And Women-Owned Subcontractors.

Some federal courts have applied strict scrutiny when a racial classification serves as an incentive, a pressure, or an obligation to favor one group over another. Other federal courts have recognized, however, that an outreach program may not be subject to strict or other heightened scrutiny as a racial or gender classification, a distinction that the First District Court of Appeals failed to recognize in the case at bar.

The First District Court of Appeals overbroadly relied upon *Adarand Constructors v. Pena*[42] for its conclusion that the City's subcontracting outreach program was subject to strict scrutiny.[43] *Adarand* considered "racial classifications" that placed the plaintiff on *unequal* footing with a similarly situated plaintiff. In *Adarand*, the challenged regulations paid the contractors more money to hire minority

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[42] 515 U.S. 200 (1995).

[43] App. 37-38.

subcontractors. The City's procurement program, by contrast, does not pay more to bidding contractors to hire minority-owned or women-owned subcontractors, yet the First District Court of Appeals failed to recognize this important distinction. The City has a discretionary "lowest and best" procurement system under which Cleveland Construction and all other bidders stand on equal footing *ex ante* when they compete for a City construction contract.

In support of its erroneous conclusion that the City's program was subject to strict or other heightened judicial scrutiny,[44] the First District Court of Appeals cited the conflicting federal circuit court authorities of *Lutheran Church-Missouri Synod v. FCC*,[45] *Bras v. California Pub. Util. Comm'n*,[46] *Monterey Mechanical Co. v. Wilson*,[47] and *Safeco Ins. Co. of America v. White House*.[48] Not only do these cases illustrate the split between the circuits as to the application of strict scrutiny, but their holdings also provide additional support for the argument that the City's program is not subject to a heightened standard of review.

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[44] App. 36-37, n.20.

[45] 141 F.3d 344 (D.C. Cir. 1998), *petition for rehearing en banc denied*, 154 F.3d 487 (D.C. Cir. 1998).

[46] 59 F.3d 869 (9th Cir. 1995).

[47] 125 F.3d 702 (9th Cir. 1997).

[48] 191 F.3d 675 (6th Cir. 1999).

It may not be surprising that lower federal courts have been unable to clearly discern the line between race-conscious factors that do not trigger strict judicial scrutiny and "racial classifications" that do. The United States Court of Appeals for the Tenth Circuit described the predicament in the year 2000:

> The Supreme Court's declarations in the affirmative action area are characterized by plurality and split opinions and by the overruling of precedent. This fractured prism complicates the task of lower courts in both identifying and applying an appropriate form of equal protection review.[49]

In *Lutheran Church-Missouri Synod*, the District of Columbia Circuit Court held that the Federal Communication Commission's equal employment opportunity regulations were subject to review under the strict scrutiny standard. The Court's reasoning was that the FCC regulations "*oblige* stations to grant some degree of preference to minorities in hiring" by attaining, or approximating, "proportional representation" mirroring "the racial breakdown of their 'metropolitan statistical area.'"[50] The Court characterized the regulations as a "screening device" that created "a strong incentive to meet the numerical goals."[51] The D.C. Circuit emphasized: "Further, and

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[49] *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1161 (10th Cir. 2000).

[50] 141 F.3d at 351-52 (emphasis added).

[51] *Id.* at 353.

most significant in a station's calculus, the Commission itself has given every indication that the employment profile is a serious matter."[52] The Court added that a government hiring program that "*can and surely will* result in individuals being granted a preference because of their race" constituted governmental action that should be subject to strict scrutiny.[53]

When denying the FCC's petition for rehearing, a majority of the D.C. Circuit reiterated the conclusion that "it is clear that these regulations *do* effectively oblige the Church to implement racial preferences in its hiring decisions" and they "indisputably pressure" race-based hiring decisions.[54] The majority suggested that a regulation that merely "authorizes" a racial preference might not become a racial classification subject to strict scrutiny.[55] Nevertheless, those judges concluded that the FCC regulations "unquestionably 'encourage' racial preferences."[56] They bluntly held that "it is the fact of encouragement ... that makes this regulation a racial classification."[57] The dissenting judges concluded that the regulations did not require

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[52] *Id.*

[53] *Id.* at 354 (emphasis added).

[54] 154 F.3d 487, 491 (emphasis in original).

[55] *Id.* at n.5.

[56] *Id.*

[57] *Id.* at 492.

or oblige the exercise of racial preferences and therefore were not subject to strict scrutiny.[58]

The D.C. Circuit Court majority's clear emphasis on the role of "encouragement" in determining what constitutes a racial classification subject to strict scrutiny presages the challenge to the City's equal opportunity and non-discrimination program and demonstrates the plain error of the First District Court of Appeals' oversimplistic conclusion that the City's program was subject to strict scrutiny: "That does not mean that any regulation encouraging broad outreach to, as opposed to the actual hiring of, a particular race would necessarily trigger strict scrutiny. *Whether the government can encourage—or even require—an outreach program specifically targeted on minorities is, of course, a question we need not decide.*"[59] The majority held that not "all race conscious measures adopted by the government must be subjected to strict scrutiny."[60] Thus, the D.C. Circuit Court expressly declined to examine the very issue at the heart of the First District Court of Appeals' holding.

The City's subcontracting outreach program, in contrast to the FCC regulations at issue in *Lutheran Church-Missouri Synod*, does not encourage the hiring of any one particular race, which was the essential concern that dictated the D.C. Circuit's conclusion that the FCC regulations were subject to strict scrutiny:

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[58] *Id.* at 491-92.

[59] *Id.* at 492 (emphasis added).

[60] *Id.* (emphasis added).

"The imposition of numerical norms based on proportional representation—which is the core element to what are often referred to as affirmative action, set aside, or quota programs—is the aspect of the Commission's rule that makes it impossible for us to apply any standard of review other than strict scrutiny."[61] The City's subcontracting outreach program does not "impose numerical norms based on proportional representation" and it does not "treat people differently according to [their particular] race."[62] In fact, the D.C. Circuit even suggested that requiring employers to examine the racial composition of their workforces (like the City's program) may be an anti-discrimination enforcement technique that does not implicate racial preferences.[63]

Finally, the majority on the D.C. Circuit emphasized the different relevance of improperly comparing, on the one hand, the proportionality of minorities in the employer's workforce to the proportionality of minorities in the *overall population* and, on the other, comparing the racial composition of those holding at issue jobs to the racial composition of qualified persons in the *labor market*. The former is not "the relevant statistical gauge."[64] The City's subcontracting outreach program, in contrast, focuses on the latter relevant gauge by generally comparing

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[61] *Id.* (emphasis added).

[62] *Id.*

[63] *Id.* at n.7.

[64] *Id.* at 493-94.

the subcontractors proposed by a bidder with *all* the qualified minority-owned owned and women-owned subcontractors in the specific labor market.

The First District Court of Appeals also cited a Ninth Circuit decision, *Monterey Mechanical Co. v. Wilson.*[65] The California statute reviewed by the Ninth Circuit *required* general contractors to subcontract percentages of work to minority, women, and disabled veteran owned subcontractors or to demonstrate good faith efforts to do so. This was a *mandatory* obligation and the statute required disqualification of a contractor's bid for noncompliance. The statute barred a contract award to a bidder that did not comply with either the percentage goals or the good faith efforts. Relying on its earlier decision in *Bras*,[66] the Ninth Circuit concluded that the mandatory California statute was subject to strict scrutiny.[67]

Bras analyzed a statutory scheme for increasing women, minority, and disabled veteran business enterprise procurement that, according to the majority of the panel, authorized the use of *set-asides*.[68] The Public Utilities Commission was empowered to sanction utility companies for failing to make

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[65] 125 F.3d 702 (9th Cir.1997); App. 37, n.20.

[66] 59 F.3d 869 (9th Cir. 1995) (also cited by the First District Court of Appeals; App. 37, n.19).

[67] 125 F.3d at 711-712.

[68] 59 F.3d at 874.

acceptable progress.[69] The dissent, by contrast, disagreed and characterized as "specious" the conclusion that set-asides were authorized.[70] In contrast, the City's subcontracting outreach program does not authorize the use of set-asides and does not empower City officials to sanction bidders for City contracts within the meaning of *Bras*, nor does the City's subcontracting outreach program automatically bar the City's purchasing agent from awarding a contract to a bidder that does not meet certain percentage goals.

The First District Court of Appeals also relied upon the Sixth Circuit decision in *Safeco Ins. Co. of America v. White House*[71] to justify its conclusion that the City's subcontracting outreach program was subject to strict scrutiny. In *Safeco*, the Sixth Circuit evaluated USEPA requirements regarding subcontracting with minority-owned and women-owned businesses. The Sixth Circuit explained that the EPA regulation "anticipates the formulation of numerical objectives (through recipients' 'fair share objectives'), or at least the creation of subcontracting 'goals.'"[72] The Sixth Circuit further concluded that the EPA interpreted its regulation in a manner "*requiring* an outcome

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[69] *Id.* at 872.

[70] *Id.* at 878.

[71] 191 F.3d 675 (6th Cir. 1999); App. 37, n.20.

[72] *Id.* at 690.

resulting in the hiring of an MBE subcontractor."[73] The Sixth Circuit indicated that strict judicial scrutiny applies only where "outreach" "'indisputably pressures' contractors to hire minority subcontractors."[74] The Sixth Circuit discussed "onerous burden[s]" and elements like "[d]ocumentation requirements and the geographic scope of solicitation" that had to be considered to determine whether there was indisputable pressure on contractors to hire minority-owned subcontractors.[75]

In *Safeco*, the Sixth Circuit surveyed the conflicting rulings by other circuit courts and stated: "Outreach efforts *may or may not* require strict scrutiny."[76] The application of strict scrutiny turned on whether the government program was, in reality, a "racial classification" that mandated the hiring of minority-owned firms. If the required outreach does not mandate the government hiring of minority-owned firms, then strict scrutiny does not apply.

Similarly, the D.C. Circuit in *Lutheran Church-Missouri Synod*, *supra*, distinguished outreach from actual hiring and expressly did not reach the question "[w]hether the government can encourage—or even require—an outreach program specifically targeted on

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[73] *Id.* at 691 (emphasis added).

[74] *Id.* at 692.

[75] *Id.* at 691.

[76] *Id.* at 692 (emphasis added).

minorities."[77] In *Safeco*, the Sixth Circuit observed that the Second Circuit had distinguished unobjectionable solicitation efforts from improper "set-asides,"[78] and that the Eleventh Circuit had found that "strict scrutiny is generally inapplicable" to outreach efforts that target one race.[79]

Since the landmark holding in *Adarand*, the jurisprudence of "racial classifications" has developed nuances. Although *Adarand* provides that "racial classifications" must be subject to strict scrutiny, at least two federal courts of appeals have extended the *Adarand* analysis by recognizing the distinction between "racial classifications" that result in "indisputable pressure" and outreach programs that promote equal opportunities for minorities and women. The D.C. Circuit in *Lutheran Church-Missouri Synod* and the Sixth Circuit in *Safeco* both distinguished outreach programs from those "racial classifications" that "indisputably pressure" contractors to favor certain subcontractors over others based solely on race. Each court of appeals acknowledged that an outreach program is not automatically a "racial classification" subject to strict scrutiny.

In relying on *Safeco* to support its holding in the case at bar, the First District Court of Appeals

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[77] 154 F.3d at 492.

[78] 191 F.3d at 690 (discussing *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992)).

[79] *Id.* at p. 692 (quoting *Allen v. Alabama State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999)).

overbroadly applied strict and other heightened scrutiny to the City's subcontracting outreach program because the City's program does not mandate the hiring of minority-owned or women-owned firms. The City's subcontracting outreach program, in contrast to the program scrutinized in *Safeco*, does not require an outcome resulting in the hiring of minority or women-owned subcontractors. It does not impose "indisputable pressure" on bidders to utilize minority or women-owned subcontractors. Moreover, under the Cincinnati Municipal Code, application of the program to a particular "lowest and best bid" procurement is facially discretionary.

The City's program is not a racial classification, it is not an improper "set-aside," and it does not mandate an outcome resulting in the hiring of minority-owned or women-owned firms. For these reasons, strict scrutiny does not apply. The First District Court of Appeals' overbroad invalidation of legitimate equal opportunity and non-discrimination efforts subjects public entities to unwarranted equal protection lawsuits and, in the case at bar, erroneously enjoined the City's program.

CONCLUSION

The City's discretionary "lowest and best" public contract procurement system places all bidding contractors on equal footing *ex ante*, allows for the consideration of bidders' efforts to use minority-owned and women-owned subcontractors to the extent of their availability, applies multiple criteria to its decisionmaking, and is not a mandated "racial classification" or "gender classification." As such, the

program by its nature is insulated against a facial equal protection challenge. Even assuming that the program is subject to such a challenge, in *Parents Involved in Community Schools*, Justice Kennedy recognized the inherent distinction between promoting equal opportunity and a government mandate based solely upon race.

Prior to this Court's 2007 decision in *Parents Involved in Community Schools*, the lower courts overbroadly construed *Adarand Constructors v. Pena*, erroneously applied strict judicial scrutiny, and facially enjoined the City's equal opportunity and non-discrimination program. The lower courts failed to recognize that a facial equal protection claim does not exist when the discretionary nature of a program allows for lawful results, and the lower courts erred by applying strict and other heightened scrutiny to the City's subcontracting outreach program.

The Court should grant this petition for writ of certiorari to reverse the rulings of the lower courts and to clearly establish that the City's efforts to achieve equality of opportunity and non-discrimination in municipal contracts is not subject to strict or other heightened judicial scrutiny. This Court and some federal circuit courts have indicated that tracking and other efforts, like the City's subcontracting outreach and non-discrimination program, are not subject to strict or other heightened scrutiny. The Court now has the opportunity to establish the line between government programs facially promoting equal opportunity and non-discrimination that are *not* subject to strict scrutiny and those mandatory individual racial or gender classifications that *are*

subject to strict or other heightened scrutiny. Alternatively, the Court should grant the petition and remand for further consideration in light of the Court's decision in *Parents Involved in Community Schools*.

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